New Ace Digital Print Sdn Bhd & Anor v Public Bank Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-1976–12 OF 2015
LIM YEE LAN, IDRUS HARUN AND ASMABI MOHAMAD JJCA
26 MAY 2017

Banking — Cheques — Forged — Allegation bank wrongfully paid out money — Whether cheque issued from joint account forged — Whether cheque null and void — Whether bank negligent — Whether bank could rely on statutory defences — Bills of Exchange Act 1949 ss 24 & 73A

The High Court had dismissed the plaintiffs' claim for the sum of RM500,000 paid out from a joint account at Public Bank Bhd ('the defendant'). According to the plaintiffs, the defendant wrongfully paid out a sum of RM500,000 from a joint account maintained at the defendant in the name of two joint account holders of Loo Keng Tatt and Lim Chi Wan through a forged cheque. The plaintiffs submitted that the payment based on a forged cheque was a nullity and void and the defendant had also breached the mandate given by both the joint account holders pursuant to the terms and conditions in the opening of account form that every cheque drawn on the joint account must bear the signatures of the two mandatory signatories, namely Loo Keng Tatt and Lim Chi Wan, but the cheque No 067709 only bore one signature, that of Lim Chi Wan while the purported signature of Loo Keng Tatt was a forged signature and was therefore null and void and of no effect in law to authorise the defendant to pay out on the cheque. The plaintiffs further pleaded that the defendant was negligent in not freezing the joint account after becoming aware of the death of Loo Keng Tatt on 22 July 2009 in order to prevent any fraudulent dealings of monies in the joint account. The High Court made a finding that Lim Chi Wan's right to the money in the account started on 22 July 2009 based on the survivorship clause and that this right existed even before Lim Chi Wan falsified the cheque. Therefore, the High Court held that the forged cheque had no effect on Lim Chi Wan's right as the surviving account holder to all the monies in the account based on the survivorship clause which formed part of the terms and conditions of the contract between the joint account holder and the defendant. Subsequently, the High Court held that the money in the account did not form part of the estate of Loo Keng Tatt and therefore the second plaintiff had no right to any money in the joint account upon Loo Keng Tatt's death to entitle her to claim for the RM500,000. Hence, the present appeal.

Held, allowing the appeal with costs:

(1) Any prima facie intention in the survivorship clause that beneficial ownership of the monies in the joint account would go to Lim Chi Wan had been rebutted by the first and second plaintiffs. The first and second plaintiffs had adduced evidence of their witnesses to show that although the joint account was opened in the joint names of Loo Keng Tatt and Lim Chi Wan, in reality the account was opened for the benefit and purpose of the first plaintiff; that all funds in the account were provided by Loo Keng Tatt through the first plaintiff; that Loo Keng Tatt was a director and managing director of the first plaintiff and together with his wife were the majority shareholders of the first plaintiff; that the rest of the shareholders were nominees and they all acted under Loo Keng Tatt's direction with regard to the usage and withdrawals of the monies in the joint account (see paras 18 & 20).

(2) By paying the sum of RM500,000 from the joint account under a forged cheque, the defendant was strictly liable to Loo Keng Tatt, the other innocent joint account holder of the joint account, for such loss. The defendant did not plead nor rely on any facts to preclude the second plaintiff on the issue of want of authority or that Loo Keng Tatt had knowingly or negligently contributed to the forgery. Therefore, the defendant was precluded from relying on the statutory defences in ss 24 and 73A of the Bills of Exchange Act 1949 (see paras 26).

(3) Although the impugned cheque was presented for payment by Lim Chi Wan on 7 August 2009, was pre-dated to a date before the death of Loo Keng Tatt on 22 July 2009. The cheque was purportedly drawn while Loo Keng Tatt was still alive which means the survivorship clause could not have kicked in yet. The bank also claimed it was not officially informed of the death until it was furnished with Loo Keng Tatt's death certificate by the second plaintiff sometime in September 2009. Hence, it made no sense and in fact illogical for the defendant to argue that on 7 August 2009 it paid out the RM500,000 to Lim Chi Wan through the impugned cheque on the basis of and pursuant to the survivorship clause. In any event, the defendant could not have relied on the survivorship clause to give it a good discharge for paying out the RM500,000 from the joint account because the defendant had failed to comply with the conditions in the survivorship clause for such payment. There was just no room for using a contractual provision as a defence to a bank's breach of a strict liability of paying out under a forged cheque (see paras 30–31 & 33).

(4) The defendant had breached the mandate given by Loo Keng Tatt and Lim Chi Wan, the joint account holders, in their account opening form that any cheque for payment of money out of the joint account must bear the signatures of both Loo Keng Tatt and Lim Chi Wan. The defendant was also negligent in failing to freeze the joint account when it became

aware of Loo Keng Tatt's death on 22 July 2009. The defendant's standard procedure did not conform to the standard of the ordinary reasonable and prudent banker, which by itself was negligent as negligence was measured against the standard of the ordinary reasonable person in the relevant industry. Consequently, the defendant did not obtain a good discharge for paying the sum of RM500,000 out of the joint account to Lim Chi Wan under the forged cheque, whether pursuant to the survivorship clause or otherwise (see paras 34–35 & 43–44).

[Bahasa Malaysia summary

Mahkamah Tinggi telah menolak tuntutan plaintif-plaintif untuk sejumlah RM500,000 yang telah dibayar daripada akaun bersama mereka di Public Bank Bhd ('defendan'). Menurut plaintif-plaintif, defendan salah membayar RM500,000 daripada akaun bersama defendan bank di bawah dua nama pemegang akaun bersama iaitu Loo Keng Tatt dan Lim Chin Wan melalui cek palsu. Plaintif-plaintif mendakwa bayaran berdasarkan cek palsu adalah tidak sah dan terbatal ab initio dan defendan telah melanggar mandat yang diberi oleh kedua-dua pemegang akaun bersama menurut syarat-syarat dalam borang pembukaan akaun bahawa setiap cek yang dikeluarkan pada akaun bersama haruslah mempunyai tandatangan kedua-dua penandatangan wajib, iaitu Loo Keng Tatt dan Lim Chi Wan, tetapi cek No 067709 hanya terdapat satu tandatangan milik Lim Chi Wan sementara tandatangan Loo Keng Tatt palsu dan dengan itu, tidak sah dan terbatal dan tidak mempunyai kesan undang-undang untuk memberikan kuasa kepada defendan membuat pembayaran bagi cek itu. Plaintif-plaintif memplidkan selanjutnya bahawa defendan cuai kerana tidak membekukan akaun bersama tersebut selepas dimaklumkan tentang kematian Loo Keng Tatt pada 22 Julai 2009 untuk mencegah urusan penipuan wang dalam akaun bersama itu. Mahkamah Tinggi mendapati hak Lim Chi Wan atas duit dalam akaun tersebut bermula pada 22 Julai 2009 berdasarkan klausa mandiri bahawa hak ini wujud sebelum Lim Chi Wan memalsukan cek. Oleh itu, Mahkamah Tinggi memutuskan cek palsu ini tidak menjejaskan hak Lim Chi Wan sebagai pemegang akaun yang masih hidup atas wang yang terdapat dalam akaun tersebut berdasarkan klausa mandiri yang membentuk sebahagian terma dan syarat kontrak antara pemegang-pemegang akaun bersama dan defendan. Akibatnya, Mahkamah Tinggi memutuskan bahawa wang dalam akaun itu bukan sebahagian estet Loo Keng Tatt dan oleh itu plaintif kedua tidak mempunyai hak atas apa-apa wang dalam akaun bersama dengan kematian Loo Keng Tatt untuk memberikan hak kepadanya menuntut RM500,000. Oleh itu, rayuan ini difailkan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Apa-apa niat prima facie dalam klausa mandiri bahawa milikan

benefisiari wang dalam akaun bersama akan ke Lim Chi Wan telah disangkal oleh plaintif pertama dan kedua. Plaintif pertama dan kedua mengemukakan keterangan saksi-saksi mereka bagi menunjukkan walaupun akaun bersama dibuka atas nama bersama Loo Keng Tatt dan Lim Chi Wan, dari segi realiti akaun dibuka untuk kepentingan dan tujuan plaintif pertama; bahawa segala dana dalam akaun dibekalkan oleh Loo Keng Tatt melalui plaintif pertama; bahawa Loo Keng Tatt adalah pengarah dan pengarah urusan plaintif pertama dan bersama-sama dengan isterinya adalah pemegang saham majoriti plaintif pertama; bahawa semua pemegang-pemegang saham lain adalah penama Loo Keng Tatt dan mereka semua bertindak mengikut arahannya berkenaan penggunaan dan pengeluaran wang dari akaun bersama (lihat perenggan 18 & 20).

(2) Dengan membuat pembayaran RM500,000 daripada akaun bersama di bawah cek palsu, defendan bertanggungjawab pada Loo Keng Tatt, pemegang akaun bersama yang tidak bersalah, bagi kerugian. Defendan dalam pembelaannya tidak memplidkan atau bergantung pada apa-apa fakta untuk menghindar plaintif kedua berkenaan isu kekurangan kuasa ataupun bahawa Loo Keng Tatt dengan sengaja atau secara tidak sengaja menyumbang kepada pemalsuan. Oleh itu, defendan adalah dihalang daripada bergantung pada pembelaan-pembelaan statutori di bawah ss 24 dan 73A Akta Bil Pertukaran 1949 (lihat perenggan 26).

(3) Walaupun cek yang dipertikaikan dikemukakan untuk bayaran oleh Lim Chi Wan pada 7 Ogos 2009, ditetapkan pada tarikh sebelumnya (17 Julai 2009) sebelum kematian Loo Keng Tatt pada 22 Julai 2009. Cek dikeluarkan semasa Loo Keng Tatt masih hidup dan ini bermakna klausa mandiri belum berkuat kuasa. Bank juga mendakwa tidak dimaklumkan secara rasmi berkenaan kematian tersebut sehingga ia diberikan sijil kematian Loo Keng Tatt oleh plaintif kedua pada bulan September 2009. Oleh itu, tidak masuk akal dan secara fakta adalah tidak logik untuk defendan menghujahkan bahawa pada 7 Ogos 2009 ia telah membuat bayaran RM500,000 kepada Lim Chi Wan melalui cek yang dipertikaikan itu atas dasar dan menurut klausa mandiri. Dalam apa-apa jua keadaan, defendan tidak boleh bergantung pada klausa mandiri untuk memberikan pelepasan sah pembayaran RM500,000 daripada akaun bersama kerana defendan gagal mematuhi syarat-syarat dalam klausa mandiri untuk bayaran sebegitu. Tiada ruang untuk menggunakan peruntukan kontraktual sebagai pembelaan terhadap pelanggaran liabiliti bank membuat pembayaran di bawah cek palsu (lihat perenggan 30–31 & 33).

(4) Defendan telah melanggar mandat yang diberikan Loo Keng Tatt dan Lim Chi Wan, pemegang-pemegang akaun, dalam borang pembukaan akaun bahawa apa-apa cek untuk pembayaran daripada akaun bersama

harus mempunyai tandatangan kedua-dua Loo Keng Tatt dan Lim Chi Wan. Defendan juga cuai dalam kegagalannya membeku akaun bersama apabila mendapat tahu bahawa Loo Keng Tatt telah meninggal dunia pada 22 Julai 2009. Prosedur standard defendan tidak mematuhi standard biasa, munasabah dan berhemat sesuatu bank, yang dengan sendirinya adalah cuai kerana kecuaian adalah diukur berbanding standard seseorang yang biasa dan munasabah dalam industri yang berkaitan. Akibatnya, defendan tidak memperoleh pelepasan sah untuk pembayaran RM500,000 daripada akaun bersama kepada Lim Chi Wan di bawah cek palsu, sama ada menurut klausa mandiri atau sebaliknya (lihat perenggan 34–35 & 43–44).]

Notes

For cases on forged cheques, see 1(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2953–2957.

Cases referred to

Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor [2006] 4 MLJ 705, CA (refd)

Lily Cheung and another v Standard Chartered Bank Hong Kong Trustee Ltd (executor of the will of Jimmy Pan Chao-Ming, deceased) and another [1988] HKCU 360, CA (refd)

Nanyang Commercial Bank Ltd v The personal representative of Vannee Nativivat, Deceased & Anor [2013] HKCU 708 (refd)

Niles v Lake [1947] SCJ No 13, SC (refd)

Northhall (deceased) Northall and another v Northall and another, Re [2010] EWHC 1448, Ch D (refd)

Swamy v Matthews & Anor [1968] 1 MLJ 138 (refd)

Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and others [1985] 2 All ER 947; [1985] 3 WLR 317, PC (refd)

United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182, SC (refd)

Legislation referred to

Bills of Exchange Act 1949 ss 24, 73A
Evidence Act 1950 s 73

Appeal from: Suit No 22NCC-1711–11 of 2012 (High Court, Kuala Lumpur)

Wong Guo Bin (Yap Chin Ling with him) (Izral Partnership) for the appellants.
Barry Goh Meng Yew (Chow Yee Wan with him) (Iza Ng Yeoh & Kit) for the respondent.

Lim Yee Lan JCA:

[1] This appeal arose from the decision of the KLHC dated 24 November 2015 which dismissed the appellants' claim for the sum of RM500,000 paid out from a joint account maintained at the respondent.

[2] Parties will be referred to in this decision as they were in the High Court.

[3] Briefly, the plaintiffs' claim against the defendant is for having wrongfully paid out a sum of RM500,000 from a joint account maintained at the defendant's bank in the name of two joint account holders, namely Loo Keng Tatt ('LKT') and Lim Chi Wan ('LCW'), through a forged cheque. The plaintiffs claimed that the payment based on a forged cheque is a nullity and void ab initio as provided in s 24 of the Bills of Exchange Act 1949 which did not give a good discharge to the defendant for paying out the said sum to LCW. The plaintiffs also claimed that apart from its breach of the strict liability imposed under s 24 of the Bills of Exchange Act 1949, the defendant also breached the mandate given by both the joint account holders pursuant to the terms and conditions in the opening of account form that every cheque drawn on the joint account must bear the signatures of the two mandatory signatories, namely LKT and LCW, but the cheque No 067709 only bore one signature, that of LCW while the purported signature of LKT, was a forged signature and was therefore null and void and of no effect in law to authorise the defendant to pay out on the cheque. Quite apart from that, the plaintiffs also pleaded that the defendant was negligent in not freezing the joint account after becoming aware of the death of LKT on 22 July 2009 in order to prevent any fraudulent dealings of moneys in the joint account.

[4] We heard the appeal on two separate days and at the conclusion we reserved our decision to today's date. Our decision is as follows.

[5] We uphold the learned HCJ's finding that the signature of LKT on cheque No 067709 ('the impugned cheque') is not his genuine signature and was forged, most probably by LCW, the other joint account holder.

[6] It is our considered view that the learned HCJ's determination that LKT's signature on the impugned cheque was forged or did not bear his genuine signature was made after having heard the oral testimony of three handwriting experts, namely, Santi a/p Chelliah ('SP2'), William Phang Chan Kok ('SP3') and Harcharan Singh Tara ('SD1') and the methodology employed by SP3 and SD1 in coming to their conclusion and also having personally examined the impugned signature under the microscope as well as comparing the impugned signature with the samples of LKT's genuine signatures pursuant to s 73 of the Evidence Act 1950. These evidences together

with her observation on the demeanour of SP3 and SD1 when giving evidence, entitled her to come to the conclusion that SP3's opinion that the signature of LKT on the impugned cheque was not his genuine signature was more credible than SD1's opinion that the signature on the impugned cheque was the genuine signature of LKT. She was entitled as the trial judge to make a preference as to which expert's opinion she would accept.

[7] We also uphold the learned HCJ's finding that the first plaintiff, not being an account holder of the joint account, therefore not a customer of the defendant, has no cause of action against the defendant bank, whether for breach of s 24 of the Bills of Exchange Act 1949, or breach of contract or negligence for not freezing the joint account upon LKT's death.

[8] We further uphold the learned HCJ's finding that the second plaintiff, as the administrator and beneficiary of the LKT's estate, has a cause of action against the defendant for breach of s 24 of the Bills of Exchange 1949, for negligence and breach of LKT's and LCW's mandate in relation to the operation of the joint account. We however hold that the learned HCJ erred in law and in fact in holding that the defendant obtained a valid discharge for paying out the RM500,000 based on the survivorship clause in the account opening form.

[9] In making such a finding, the learned HCJ had agreed with learned counsel for the defendant that LCW's right to the money in the account started on 22 July 2009, ie the date of LKT's death, based on the survivorship clause and that this right existed even before LCW falsified the cheque.

[10] Therefore the forged cheque had no effect on LCW's right as the surviving account holder to all the moneys in the account based on the survivorship clause which formed part of the terms and conditions of the contract between the joint account holder and the defendant.

[11] The learned HCJ went on to hold that had LCW applied to the defendant through the lawful manner, the defendant was still bound to comply with the survivorship clause in the opening of account form because the money in the account had already vested in LCW after the death of LKT.

[12] In consequence, she held that the money in the account did not form part of the estate of LKT and therefore the second plaintiff, as the beneficiary and administrator of LKT's estate, had no right to any money in the joint account upon LKT's death to entitle her to claim for the RM500,000.

[13] We are of the considered view that the learned HCJ committed a

fundamental error of law with regard to her findings on the effect of the survivorship clause. A

[14] Her statement of law on the effect of a survivorship clause is against the general principle governing a survivorship clause in a joint account as established in a number of local and foreign case law authorities (see *Latifah bte Mat Zin v Rosmawati bte Sharibun & Anor* [2006] 4 MLJ 705; *Lily Cheung and another v Standard Chartered Bank Hong Kong Trustee Ltd (executor of the will of Jimmy Pan Chao-Ming, deceased) and another* [1988] HKCU 360; *Nanyang Commercial Bank Ltd v The personal representative of Vannee Nativivat, Deceased & Anor* [2013] HKCU 708 and *Niles v Lake* [1947] SCJ No 13). B C

[15] These authorities established that a survivorship clause without more is just a contractual arrangement between the bank and the joint account holders as to how to deal with the money in the joint account. It is not conclusive evidence of the parties' intention as to ownership of the money in the joint account. The parties' intention overrides the survivorship clause. In drawing inference of common intention greater weight is to be given to the source of the funds in the joint account and the presumption of resulting trust in favour of the joint account holder who provided the funds than to the survivorship clause. At the highest, a survivorship clause indicates a prima facie intention only, which is by no means conclusive and can be displaced by circumstances. D E

[16] In *Re Northhall (deceased) Northall and another v Northall and another* [2010] EWHC 1448 (quoted in *Nanyang Commercial Bank*), the survivor's claim to the balance in a joint account under a survivorship clause was rejected by the court. The court placed more significance on the source of the funds in the account and the presumption of resulting trust (see also para 27 of *Nanyang Commercial Bank*). F G

[17] Hence, who is the beneficial owner of the money in a joint account depends on the intention of the parties and in this case LCW depends on the survivorship clause per se to say that it was the common intention between him and LKT that the surviving joint account holder would be the beneficial owner of the funds in the account. But this prima facie intention could be rebutted by facts and circumstances of the case. H

[18] Here the first and second plaintiffs had adduced evidence of their witnesses to show that although the joint account was opened in the joint names of LKT and LCW, in reality the account was opened for the benefit and purpose of the first plaintiff; that all funds in the account were provided by LKT through the first plaintiff; that LKT was a director and managing director of the first plaintiff and together with his wife were the majority shareholders (75%) of the first plaintiff; that the rest of the shareholders are nominees LKT I

and they all acted under his direction with regard to the usage and or withdrawals of the moneys in the joint account.

[19] On the other hand, there was no evidence before the High Court that LCW had contributed any funds into the joint account. In fact, the learned HCJ's finding showed that LCW had merely relied on the survivorship clause as the basis of his claim.

[20] Hence, any prima facie intention in the survivorship clause that beneficial ownership of the moneys in the joint account would go to LCW had been rebutted by first and second plaintiffs through their witnesses.

[21] We also noted that the learned HCJ had found that once a survivorship clause forms part of the terms and conditions governing the operation of the joint account, then s 24 of the Bills of Exchange Act 1949 has no effect notwithstanding that the money was withdrawn through a forged cheque. The learned HCJ even went to the extent of saying that had LCW applied to the court for the RM500,000 to be released to him under the survivorship clause, the court would have awarded the money to him under the survivorship clause. In other words, the learned judge in her judgment went to the extent of suggesting that the survivorship clause provides a complete defence to the bank's breach of s 24 of the Bills of Exchange Act.

[22] We hold that the learned HCJ seriously erred in her aforementioned finding.

[23] Now the law on s 24 of the Bills of Exchange Act, which is a codification of the common law position regarding payment by a banker under a forged cheque, is clear (see, inter alia: *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182, following *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd and others* [1985] 2 All ER 947; [1985] 3 WLR 317).

[24] In the case of *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* the Supreme Court, through Annuar J (as he then was) held, inter alia:

> At common law, the liability of a banker is founded on the tort of conversion, which is a tort of strict liability. A banker who pays out on a forged instrument drawn on his customer's account is absolutely liable to make good the loss. The forged instrument is a nullity and a banker has no authority, actual or implied, form his customer to act on it; ... s 24 of the Bills of Exchange Act 1949, creates a limited exception in favour of a banker. ... Section 24 protects a banker by recourse to the doctrine of estoppel. A customer cannot recover if he has represented to his banker that the forged signature is effective and that the instrument is accordingly good for payment.

[25] Hence, it is clear from the above authorities that a banker who pays out on a forged instrument is absolutely liable to make good the loss. It is no answer for the bank to say that it was unaware of the forgery or that it took reasonable care. The liability of the bank for making payment on a forged instrument is based on the tort of conversion which is a strict liability.

[26] Coming back to this case before us, by paying the sum of RM500,000 from the joint account under a forged cheque, the defendant was strictly liable to LKT, the other innocent joint account holder of the joint account, for such loss, unless the defendant could bring itself within the exception in s 24, ie that LKT 'was precluded from setting up the forgery or want of authority' or within s 73A of the Bills of Exchange Act 1949 that LKT had knowingly or negligently contributed to the forgery.

[27] It is not disputed that the defendant did not in its defence plead nor did it rely on any facts to preclude the second plaintiff (as the beneficiary and administrator of LKT's estate) on the issue of want of authority or that LKT had knowingly or negligently contributed to the forgery. Therefore, the defendant was precluded from relying on the statutory defences in ss 24 and 73A of the Act.

[28] Having regard to the extant law under s 24 of the Bills of Exchange Act as discussed above, the learned judge therefore erred in law in that having found that the signature of LKT on the impugned cheque was a forgery, which would have immediately attracted the operation of the strict liability provision of s 24, she nevertheless went on to hold that the survivorship clause operates to give the defendant a good discharge in paying the RM500,000 to LCW.

[29] On the bank's defence that the RM500,000 was paid out on 7 August 2009 *pursuant* to the survivorship clause in the account opening form, we agree with the second plaintiff that it was clearly an *afterthought*. The evidence of SD3 shows clearly that the said sum was paid under the impugned cheque on the assumption that the cheque was properly and validly drawn on the said join-account with genuine signatures of LKT and LCW, the two compulsory signatories to the cheque.

[30] We noted that the impugned cheque, although presented for payment by LCW on 7 August 2009, was pre-dated to a date (ie 17 July 2009) before the death of LCW on 22 July 2009. In other words, the cheque was purportedly drawn while LKT was still alive which means the survivorship clause could not have kicked in yet. The bank also claimed it was not *officially* informed of the death until it was furnished with LKT's death certificate by the second plaintiff sometime in September 2009. Hence, it made no sense and in fact illogical for the defendant to argue that on 7 August 2009 it paid out the RM500,000 to

LCW through the impugned cheque *on the basis of and pursuant to the survivorship clause.*

[31] It is our further view that, in any event, the defendant could not have relied on the survivorship clause to give it a good discharge for paying out the RM500,000 from the joint account because the defendant had failed to comply with the conditions in the survivorship clause for such payment.

[32] It is clear from its terms that any payment pursuant to the survivorship clause is subject, inter alia, to the *Laws of Malaysia*. One of the laws of Malaysia is the Bills of Exchange Act and as discussed above s 24 of the Act renders a payment based on a forged cheque a nullity and the bank commits an act of conversion against the customer and must make good the loss suffered by the customer through the unauthorised withdrawal from the account. In this case, the forgery was perpetrated by one joint account holder (LCW) which caused loss to the account of the same amount which the defendant must absolutely make good.

[33] We are unable to agree with learned counsel for the defendant that the words 'Laws of Malaysia' should be read *ejuesdem generis* with the other laws specified in the bracket, ie the Estate Duty Enactments and Faraid Laws. Firstly, the *ejudsdem generis* rule is a rule of interpretation of a statute while the survivorship clause is a contractual provision governing the operation of the joint account. Secondly, we agree with learned counsel for the plaintiffs that the survivorship clause was drafted by the defendant and hence the generally accepted *contra proferentum* rule in the interpretation of contractual document would apply against the defendant that had it intended the words 'Laws of Malaysia' to have the same genus as the other laws in the bracket, it would have stated so clearly. Thirdly, the bank cannot purport to *contract out* the strict liability provision in s 24 of the Bill of Exchange Act relating to payment based on a forged cheque. That would be against public policy and contrary to the intention of Parliament in enacting s 24 and the statutory defence under s 73A of the Act. There is just no room for using a contractual provision (a survivorship clause) as a defence to a bank's breach of a strict liability of paying out under a forged cheque.

[34] It is also our considered view that based on the facts and circumstances of this case, the defendant had breached the mandate given by LKT and LCW, the joint account holders, in their account opening form that any cheque for payment of money out of the joint account must bear the signatures of both LKT and LCW. Here, it has been established by evidence that LKT's signature on the impugned cheque had been forged by LCW.

[35] We are further of the view and agree with learned counsel for the

plaintiffs that that the defendant was negligent in failing to freeze the joint account when it became aware of LKT's death on 22 July 2009.

[36] In this regard, we agree with and adopt the following submissions of learned counsel for the second plaintiff.

[37] Firstly, both SD2 and SD3 who were officers in the same branch where the joint account was opened, knew of LKT's death on 22 July 2009 as indicated by their sending the wreath and condolence note and SD2 had even attended the wake during the funeral.

[38] Secondly, SD3 had admitted that as at 22 July 2009 the defendant clearly had knowledge that LKT had passed away through the bank's director of credit operations at the material time (Quah Ewe Lee) and that the bank ought to have frozen the joint account which would have prevented LCW from withdrawing the RM500,000 on the forged cheque.

[39] Thirdly, SD3 also admitted during his evidence that notwithstanding its pleading at para 14.4 of its defence, there is no requirement in the terms of the joint account that says that in the event of death of a customer, the bank must be formally notified by way of a death certificate.

[40] Fourthly, SD3 also admitted that the condolence card was sent by Ms Teoh, the business manager of the bank with condolences 'from the management and staff of the Public Bank, KL main office', the same branch of the bank in which the joint account was opened and operated from. This showed that Mr Quah and Ms Teoh knew LKT as a regular customer of the defendant. Yet the defendant did not freeze the account immediately upon becoming aware of LKT's death which facilitated the forgery committed by LCW in withdrawing the money form the joint account through a forged cheque on 7 August 2009.

[41] We further agree with learned counsel for the second plaintiff that the defendant was negligent in failing to check with LKT as the other owner and signatory of the joint account on the withdrawal of a large sum of RM500,000 despite both SD2 and SD3 agreeing that it would have been prudent to check/call the co-owner and signatory. In her testimony SD2 admitted that the bank should have also verified with LKT as he also had an interest in the account. In SD3's testimony, he admitted that the defendant ought to take precautionary measures to call LKT. SD3 also admitted it is possible that one joint account holder may cheat the other and the risk is there.

[42] SD3 further admitted that while it was not the defendant's standard procedure, it would have been prudent for a banker such as the defendant to

have called the other joint account holder, in this case, LKT to verify payment of the sum of RM500,000 to only LCW.

[43] We further agree with the submission of learned counsel for the second plaintiff that SD2's and SD3's evidence showed an admission that the defendant's standard procedure does not conform to the standard of the ordinary reasonable and prudent banker, which by itself is negligent as negligence is measured against the standard of the ordinary reasonable person in the relevant industry (*Swamy v Matthews & Anor* [1968] 1 MLJ 138).

[44] Consequently, in conclusion, we hold that the defendant did not obtain a good discharge for paying the sum of RM500,000 out of the joint account to LCW under the forged cheque, whether pursuant to the survivorship clause or otherwise.

[45] We now come to the next issue, which is this. What is the measure of damages which would have been recoverable by LKT from the defendant as the innocent joint account holder for the defendant's breach of LKT's mandate and breach of contract governing the operation of the account and negligence in not verifying with him before paying out the cheque and in not freezing the account upon his death?

[46] In his book, *Banking Law* (2nd Ed by PCC Lexis Nexis), the learned author Poh Chu Chai opines in Chapter Four under the heading 'Joint Bank Accounts' at p 244 para 9.6 under heading 'Damages recoverable by Account Holder', as follows:

> When an action for breach of contract is brought by an individual joint account holder against a bank, what is the measure of damages recoverable from the bank? Let us suppose that one joint account holder forges the signature of the other account holder on a cheque. The bank is prima facie acting in breach of contract if it pays on the cheque. What can the innocent account holder recover from the bank? The funds kept in a joint account constitute joint property, and what has been wrongfully withdrawn from the account is presumably also joint property. *On principle, an innocent account holder cannot recover beyond his own share of the funds, namely, half of what has been wrongfully taken from the account unless he is able to show that his share in the account is larger than a half share.* An innocent joint account holder is generally entitled to recover his own share of the loss. ...
>
> In *Catlin v Cyprus finance Corporation Ltd*, Bingham J awarded an innocent joint account holder damages amounting to one half of the amount wrongfully withdrawn from the account.
>
> ...
>
> Devlin J decided that a bank was liable in conversion when it collected for the personal account of a partner, cheques made payable to the partnership. The

innocent partner was entitled to recover damages amounting to one half of the value of the cheques. ... One co-owner could commit an act of conversion in respect of joint property.

[47] So the question here is whether LKT (and consequently his estate) is entitled to half or more than half or all of the sum of RM500,000 as a measure of his loss/damages as a result of the defendant's breach of its statutory and contractual duties and negligence?

[48] We had earlier found that the second plaintiff was able to prove, on a balance of probabilities, that as between LKT and LCW, LKT was more entitled to all the moneys in the joint account than LCW. In any case, LCW, who was the perpetrator of the forgery which had caused loss to the joint account in the sum of RM500,000, should not be allowed to benefit from his own wrong.

[49] This court therefore makes a finding that the measure of damages to be awarded to LKT for the loss suffered as a consequence of the defendant's breach of its statutory duty under s 24 of the Bills of Exchange Act, breach of LKT's mandate as the innocent joint account holder and its negligence in the handling of the account would be the sum of RM500,000 wrongfully withdrawn from the said joint account.

DECISION AND ORDER

[50] For the going reasons, we allow the appeal with costs and set aside the order of the HCJ.

[51] In view of our findings as aforesaid, we allow the prayers sought in paras (b)–(c) and (f) of the statement of claim.

[52] In consequence we make an order that the RM500,000 shall be paid to the second plaintiff by the defendant within two weeks from today. The judgment sum shall carry interest at the rate of 5%pa from the date of the wrongful payment to the date of full realisation.

[53] With regard to costs, after hearing submission we fixed costs at RM70,000 for here and at the High Court to the plaintiffs, subject to payment of allocator fee. We also ordered deposit to be refunded.

Order accordingly.

Reported by Afiq Mohamad Noor